See Kek Chuan v Public Prosecutor

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO B-05–106 OF 2011
ABDUL MALIK ISHAK, AZAHAR MOHAMED AND ZAWAWI SALLEH JJCA
8 MAY 2013

Evidence — Adverse inference — Failure of prosecution to tender tape-recording — Accused arrested in hotel lobby for allegedly carrying dangerous drugs in bag — Defence contended bag was carried by accused's friend who dropped it and ran on seeing police — Whether production of CCTV recording at lobby area could have verified prosecution's version — Whether defence prejudiced and disadvantaged by non-production of recording — Whether adverse inference should have been invoked against prosecution — Whether accused should have been acquitted and discharged without calling for defence — Evidence Act 1950 s 114(g)

The appellant's instant appeal against his conviction and sentence of death by the High Court for trafficking in 8,253.7g ketamine — an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952 — turned on the prosecution's failure at the trial to produce a CCTV recording of events that took place in the lobby of a hotel at the time the appellant was arrested there by a police party. Acting on information that a drug trafficking activity was scheduled to take place at the hotel, the police party led by PW3 had waited in ambush for the appellant to arrive. PW3 testified at the trial that when the appellant arrived alone in a car, parked in front of the hotel and was walking towards the hotel's lobby with a black bag in hand, he followed the appellant, approached him, held his shoulders and introduced himself as a police officer. At that juncture, the other police personnel in ambush arrived at the scene. The appellant was taken to a room and a search revealed the ketamine inside the bag. The appellant's defence, however, was that he had gone to the hotel with a friend named Ah Fatt who was then carrying the bag and that both of them were about to enter the hotel when Ah Fatt, on seeing several persons approaching them, threw the bag down and fled leaving the appellant alone to be arrested by the police with the bag near him on the floor. Evidence was adduced that there were CCTV cameras focused at 32 locations at the hotel including the lobby. The security officer of the hotel, PW4, categorically stated that the police had requested for and were given the CCTV recordings. His evidence was contradicted by the hotel's Director of Security and Safety, PW9, who said the CCTV recordings were not given to the police because there was no written request for it. Despite these contradictory narratives and the non-production of the CCTV footage, the trial judge accepted the prosecution's case as credible. Yet another instance of conflicting testimony was when PW3 said that two of

the officers in the ambush party, PW7 and Lance Corporal Norshila, who were stationed in the security guard's control room, could observe the front entrance to the hotel through a window in the room. PW7 had testified that he saw PW3 following the appellant who was walking alone towards the hotel lobby carrying a bag. PW9, however, denied there was any window in the room through which PW7 could have seen what he had described. The trial judge regarded this conflict in testimony as not material enough to prejudice the prosecution's case. The appellant's sole ground of appeal was that the non-production of the CCTV recording of the hotel lobby prejudiced and disadvantaged his case and, if it had been produced, it would have negated the prosecution's case.

Held, allowing the appeal and acquitting and discharging the appellant:

(1) Bereft of the CCTV recording, the prosecution's case collapsed like a deck of cards. The prosecution had adduced evidence that a copy of the CCTV recording was handed over to the police and yet the prosecution did not tender it as an exhibit. This amounted to withholding or suppression of evidence and the trial judge should have invoked the adverse presumption under s 114(g) of the Evidence Act 1950 against the prosecution and acquitted and discharged the appellant without calling for his defence (see para 29).

(2) The importance of the CCTV footage could not be doubted. Its non-production disadvantaged or prejudiced the defence and the truth of the prosecution's case could not be verified. If it had been produced it would have cleared the lingering doubt whether Ah Fatt was carrying the bag and threw it to the floor and bolted leaving the appellant to face the music or whether the appellant was all alone and carrying the bag when he was arrested by PW3 (see paras 29 & 34).

(3) The conflicting testimony between PW4 and PW9 as to the nagging question of whether the CCTV recording was given to the police struck at the very root of the prosecution's case and it must surely benefit the defence. When the prosecution's evidence admitted of two or more inferences one of which was in the accused's favour, it was the court's duty to draw the inference that was favourable to the accused (see paras 32 & 45).

(4) Without any window in the control room (security guard's room) how could PW7 have seen what transpired outside the room. The trial judge shut his eyes to the obvious and ignored the fact that PW7's testimony was highly suspect. The versions of PW3 and PW7 could have been easily verified if the CCTV footage was tendered by the prosecution. Yet, in its absence, the trial judge made a finding of fact that the appellant had possession of the bag and knew that the bag contained the ketamine (see paras 43-44).

[Bahasa Malaysia summary

Rayuan perayu ini adalah terhadap sabitan dan hukuman mati yang dijatuhkan oleh Mahkamah Tinggi bagi pengedaran 8,253.7g ketamine — satu kesalahan di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 — atas kegagalan pihak pendakwaan untuk mengemukakan, semasa perbicaraan, rakaman CCTV kejadian-kejadian yang berlaku di lobi hotel ketika perayu ditahan di sana oleh pasukan polis. Bertindak atas maklumat bahawa satu aktiviti pengedaran dadah dijadualkan akan berlaku di hotel, pasukan polis yang diketuai oleh PW3 telah menunggu untuk menyerang hendap perayu apabila dia tiba. PW3 memberi keterangan semasa perbicaraan bahawa apabila perayu tiba berseorangan di kereta, meletak keretanya di hotel dan sedang berjalan ke arah lobi hotel dengan membawa sebuah beg hitam, dia telah mengekori perayu, mendekatinya, memegang bahunya dan memperkenalkan dirinya sebagai pegawai polis. Ketika itu, pegawai-pegawai polis serang hendap yang lain tiba di tempat kejadian. Perayu dibawa ke sebuah bilik dan satu carian mendedahkan bahawa terdapat ketamine dalam beg tersebut. Pembelaan perayu, walau bagaimanapun, adalah bahawa dia telah ke hotel bersama-sama dengan seorang kawan bernama Ah Fatt yang ketika itu membawa beg tersebut dan bahawa kedua-dua mereka hendak memasuki hotel tersebut apabila Ah Fatt, setelah melihat beberapa orang mendekati mereka, telah mencampakkan beg tersebut dan melarikan diri, meninggalkan perayu keseorangan untuk ditangkap oleh polis dengan beg yang berdekatan dengannya di atas lantai. Keterangan dikemukan bahawa terdapat kamera CCTV yang memfokuskan pada 32 lokasi dalam hotel termasuk lobi. Pengawal keselamatan di hotel tersebut, PW4 menyatakan secara kategori bahawa pihak polis telah meminta dan diberikan rakaman-rakaman CCTV tersebut. Keterangannya disanggah oleh Pengarah Sekuriti dan Keselamatan hotel tersebut, PW9, yang menyatakan bahawa rakaman-rakaman CCTV tidak diberikan kepada pihak polis kerana tiada permohonan bertulis baginya. Walaupun terdapat naratif-naratif berbeza dan dengan ketiadaan rakaman CCTV, hakim bicara menerima kes pihak pendakwaan sebagai boleh dipercayai. Satu lagi contoh keterangan bercanggah adalah apabila PW3 menyatakan bahawa dua daripada pegawai dalam pasukan serang hendap, PW7 dan Lans Korporal Norshila, yang bertugas di bilik kawalan pengawal keselamatan, dengan mudahnya boleh melihat pintu masuk bahagian hadapan hotel melalui tingkap dalam bilik tersebut. PW7 memberi keterangan bahawa dia melihat PW3 kerana perayu sedang berjalan berseorangan ke arah hotel sambil membawa sebuah beg. PW9, walau bagaimanapun, menafikan bahawa terdapat sebarang tingkap dalam bilik tersebut yang membolehkan PW7 melihat apa yang digambarkannya. Hakim bicara menganggap konflik dalam keterangan ini sebagai tidak cukup material untuk memprejudiskan kes pihak pendakwaan. Alasan utama perayu adalah bahawa ketiadaan rakaman CCTV lobi hotel memprejudiskan dan melemahkan kesnya dan, jika ia telah dikemukakan, akan menafikan kes pihak pendakwaan.

Diputuskan, membenarkan rayuan dan melepaskan dan membebaskan perayu:

(1) Tanpa rakaman CCTV, kes pihak pendakwaan runtuh bagai kepingan-kepingan kad. Pihak pendakwaan telah mengemukakan keterangan bahawa satu salinan rakaman CCTV telah diserahkan kepada pihak polis namun pihak pendakwaan tidak mengemukakannya sebagai ekshibit. Ini terjumlah kepada keengganan memberikan atau penahanan keterangan dan hakim bicara seharusnya membangkitkan anggapan bertentangan di bawah s 114(g) Akta Keterangan 1950 terhadap pihak pendakwaan dan melepaskan dan membebaskan perayu tanpa memanggilnya untuk membela diri (lihat perenggan 29).

(2) Kepentingan CCTV tersebut tidak boleh diragui. Ketiadaannya melemahkan atau memprejudiskan pembelaan dan kebenaran kes pihak pendakwaan tidak boleh ditentusahkan. Jika ia telah dikemukakan, ia akan melenyapkan keraguan sama ada Ah Fatt telah membawa beg tersebut dan mencampakkannya ke lantai dan bergegas meninggalkan perayu untuk berhadapan dengan pertuduhan atau sama ada perayu berseorangan dan membawa beg tersebut semasa dia ditahan oleh PW3 (lihat perenggan 29 & 34).

(3) Keterangan bercanggah antara PW4 dan PW9 mengenai soalan-soalan mendesak tentang sama ada rakaman CCTV yang diberikan kepada pihak polis berkenaan asas kes pihak pendakwaan dan ini akan memanfaatkan pembelaan. Apabila keterangan pihak pendakwaan menerima dua atau lebih inferens yang mana salah satu daripadanya berpihak kepada perayu, adalah menjadi tugas mahkamah untuk menyimpulkan inferens yang berpihak kepada perayu (lihat perenggan 32 & 45)

(4) Tanpa sebarang tingkap di bilik kawalan (bilik pengawal keselamatan) bagaimana PW7 boleh melihat apa yang berlaku di luar bilik. Hakim bicara tidak mengambil kira fakta yang jelas dan tidak mempedulikan bahawa keterangan PW7 amat disyaki. Versi-versi PW3 dan PW7 dengan mudahnya boleh disahkan sekiranya rakaman CCTV dikemukakan oleh pihak pendakwaan. Namun, dengan ketiadaannya, hakim bicara membuat dapatan fakta bahawa perayu mempunyai milikan ke atas beg dan mengetahui bahawa beg tersebut mengandungi ketamine (lihat perenggan 43–44).]

Notes

For a case on failure of prosecution to tender tape-recording, see 7(1) *Mallal's Digest* (4th Ed, 2013 Reissue) para 220.

Cases referred to

Abdullah Zawawi v PP [1985] 2 MLJ 16, SC (refd)
Adzhaar bin Ahmad & Anor v PP [1996] 4 MLJ 85, HC (refd)
Azahan bin Mohd Aminallah v PP [2005] 5 MLJ 334; [2004] 6 AMR 810, CA (refd)
Brown v Stott (Procurator Fiscal Dunfermline) [2001] 2 All ER 97; [2001] SC 43; [2003] 1 AC 681, PC (refd)
Cheak Yoke Thong v PP [1984] 2 MLJ 119, FC (refd)
Chua Kim Suan v Ang Mek Chong [1988] 3 MLJ 231, HC (refd)
Dato' Seri Anwar bin Ibrahim v PP [2010] 2 MLJ 312, FC (refd)
Eastern & Oriental Hotel (1951) Sdn Bhd v Ellarious George Fernandez & Anor [1989] 1 MLJ 35, SC (refd)
Goi Ching Ang v PP [1999] 1 MLJ 507, FC (refd)
Guthrie Sdn Bhd v Trans-Malaysian Leasing Corp Bhd [1991] 1 MLJ 33, SC (refd)
Harchand Singh & Anor v State of Haryana AIR 1974 SC 344, SC (refd)
Harjit Singh Mann v S Umrao Singh and others AIR 1980 SC 701, SC (refd)
Jazuli bin Mohsin v PP [1990] 2 MLJ 190, HC (refd)
Khua Kian Keong and another v PP [2003] 4 SLR 526, HC (refd)
Lee Ah Seng & Anor v PP [2007] 6 MLJ 1; [2007] 4 AMR 709, FC (refd)
Munshilal v State of MP [1960] MPLJ 13 (refd)
Munusamy v PP [1987] 1 MLJ 492, SC (refd)
Murugesam Pillai v Gnana Sambandha Pandara Sannadhi AIR 1917 PC 6, PC (refd)
Narain and two others v The State of Punjab AIR 1959 SC 484, SC (refd)
Periasamy v PP [1966] 1 MLJ 138, FC (refd)
PP v Abdul Manaf bin Muhamad Hassan [2006] 3 MLJ 193; [2006] 2 CLJ 129, FC (refd)
PP v Abdul Razak bin Johari [1991] 1 MLJ 105, HC (refd)
PP v Chew Yoo Choi [1990] 2 MLJ 444, HC (refd)
PP v Kasmin bin Soeb [1974] 1 MLJ 230 (refd)
PP v Lee Eng Kooi [1993] 2 MLJ 322, HC (refd)
PP v Mohd Fazil bin Awaludin [2009] 7 MLJ 741; [2009] 2 CLJ 862, HC (refd)
PP v Rajandiran a/l Kadirveil [2002] 7 MLJ 77, HC (refd)
PP v Tai Mei Yuen [2004] 4 MLJ 541, HC (refd)
Ragg v Magistrates Court of Victoria & Corcoris [2008] VSC 1, SC (refd)
Ram Prakash Das v Anand Das AIR 1916 PC 256, PC (refd)
Rameshwar Singh v Bajit Lal Pathak and others AIR 1929 PC 95, PC (refd)
Tai Chai Keh v PP [1948–1949] Supp MLJ 105b, CA (refd)
Tan Hun Wah v PP and another appeal [1994] 1 MLJ 382; [1994] 1 AMR 113, SC (refd)
Yusoff bin Kassim v PP [1992] 2 MLJ 183, SC (refd)

Legislation referred to

Criminal Procedure Code ss 51A, 422
Dangerous Drugs Act 1952 s 39B(1)(a), (2), First Schedule
Evidence Act 1950 s 114(g)
Representation of the People Act 1951 [IND]
Suppression of Immoral Traffic in Women and Girls Act 1956 [IND]

Appeal from: Criminal Trial No 45A–141 of 2008 (High Court, Shah Alam)

Azizzul Shariman bin Mat Yusoff (Azizzul & Ariff) for the appellant/accused.
Shoba Venu Gobal (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent/prosecution.

Abdul Malik Ishak JCA (delivering judgment of the court):

INTRODUCTION

[1] The High Court judge convicted the appellant for trafficking in dangerous drugs, to wit, 8,253.7g of ketamine, an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA') and punishable under s 39B(2) of the DDA, and sentenced him to death. Aggrieved, the appellant now appeals to this court. The amended charge as per exh 'P26' framed by the prosecution reads as follows:

> Bahawa kamu pada 3 Ogos 2008 jam lebih kurang 3.00 petang di lobi Hotel Sunway Resort & Spa, Persiaran Lagoon, Bandar Sunway, Petaling Jaya, di dalam daerah Petaling, di dalam Negeri Selangor Darul Ehsan, telah didapati memperedarkan dadah berbahaya iaitu sejumlah berat 8253.7 gram Ketamine, dan oleh yang demikian kamu telah melakukan suatu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah seksyen 39B(2) Akta yang sama.

THE FACTUAL MATRIX OF THE CASE

[2] ASP Loi Yew Lik ('PW3'), the complainant in the case, received an information pertaining to a drug trafficking activity on 3 August 2008 at 12pm concerning one male Chinese that would take place at the Sunway Resort & Spa Hotel ('the said hotel'). PW3 then briefed his police personnel pertaining to the information which he received and together, they all proceeded to the said hotel.

[3] On arrival at the said hotel, PW3 and his police personnel took up ambush positions. PW3 stationed himself alone near the valet parking area in his motorcar Toyota Vios. While Lance Corporal Samsuri bin Sujono ('PW7') and Lance Corporal Norshila were stationed in the security guard's room of the said hotel.

[4] At about 3pm, PW3 saw the appellant arrived at the said hotel driving a Volvo motorcar bearing registration number WDV 8968. The Volvo motorcar stopped right in front of the said hotel and PW3 saw the appellant, who was alone, alighted from the driver's seat and opened the back door, behind the driver's seat, and removed a black bag using the appellant's right hand. At this juncture, before PW3 got out of his Toyota Vios motorcar, he spoke to his police personnel via walkie talkie and told them not to take any action and to let him (PW3) conduct the arrest of the appellant. Still keeping an eye on the appellant, PW3 also saw the appellant carried the black bag in his right hand and walked towards the lobby of the said hotel. PW3 followed suit and approached the appellant and held the appellant's shoulders and introduced himself as a police officer. At that point of time, the appellant was still holding onto the black bag in his right hand. PW7 and Lance Corporal Norshila arrived and PW3 brought the appellant into a room marked as 'staff door'.

[5] Inside the staff room, PW3 again introduced himself as a police officer to the appellant and showed him his authority card and read the caution to the appellant. According to PW3, the appellant kept silent and looked shocked. PW3 then examined the black bag in the presence of the appellant and found that it was zipped up but not locked. PW3 opened the black bag and found ten packages wrapped in Chinese newspapers which was filled with white powder suspected to be drugs. In due course, the government chemist by the name of Maimonah bt Sulaiman ('PW1') analysed the white powder and confirmed that it was ketamine, weighing 8,253.7g, a dangerous drug listed in the First Schedule to the DDA.

THE DEFENCE OF THE APPELLANT

[6] That on 2 August 2008 at about 2pm, the appellant received a telephone call from a friend by the name of Ah Fatt who invited him for a drink in Puchong in a shop called Ta Sa Ein. After drinking, Ah Fatt requested the appellant to send him to the said hotel because he wanted to stay there. The appellant obliged and brought Ah Fatt to the said hotel. On arrival at the said hotel, the appellant and Ah Fatt alighted from the motorcar and Ah Fatt took the bag from the back of the said motorcar. Both of them then entered the said hotel. When they were about to enter the said hotel, a group of people came from the front and at the same time, Ah Fatt threw the bag down and fled leaving the appellant alone. The group of people who came from the front took the bag and arrested the appellant. They identified themselves as police officers. The appellant was then taken to the Puchong Police Station. The key to the motorcar was seized by the police from the appellant and the police told the appellant that the drugs belonged to the appellant. According to the appellant, he told the police that the bag was not his and that the bag belonged to Ah Fatt who fled from the scene. At the police station, the appellant's personal effects

like wallet and the handphone were seized by the police. The appellant said that he knew Ah Fatt for about one year when both of them were working together making mosaic tiles. According to the appellant, the names Ah Fatt and Ah Huat refer to the same person. In Mandarin, it is known as 'Ah Fatt' while in Hokkien dialect, it is known as 'Ah Huat'.

[7] Under cross-examination by the prosecution, the appellant testified that he did not know the full name of Ah Huat. The appellant and his friends knew and call him as Ah Huat. The appellant was told by Ah Huat that the latter stayed in Malacca. The appellant admitted going to Ah Huat's house on two occasions in Melaka Jaya but the appellant did not know the name of the housing estate. The appellant went to Malacca in Ah Huat's motorcar. The appellant did not know the registration number of Ah Huat's motorcar. The appellant contacted Ah Huat via telephone and the appellant gave Ah Huat's telephone number as 016-9137857.

[8] Again, under cross-examination, the appellant disagreed that Ah Huat did not exist and that Ah Huat was not with him on that day. The appellant also disagreed that he drove the Volvo motorcar alone and that there was no one else with him. The appellant agreed that when he arrived at the said hotel, he parked the Volvo motorcar in front of the said hotel. But, the appellant disagreed that as he alighted from the Volvo motorcar he opened the back door, behind the driver's seat. The appellant disagreed that after opening the back door, behind the driver's seat of the Volvo motorcar, he took out a bag. The appellant disagreed that the bag which he was said to have taken out from the Volvo motorcar was like the one in the photograph. However, the appellant admitted that when he was arrested, he was shocked but he did not sigh ('mengeluh'). The appellant testified that the police only opened the bag but did not take out its contents.

[9] The appellant disagreed that when he was arrested, he was holding the bag. The appellant said that the bag was on the floor. The appellant said that he did not know that PW3 had arrested him by holding his shoulders because at that time the situation was chaotic ('kelam kabut') and that there were a lot of policemen that came from the front.

[10] Again, under cross-examination, the appellant disagreed that he did not inform the police about Ah Huat's telephone number. But he agreed that the police informed him that the police attempted to telephone Ah Huat but was not successful. The appellant did not know whether the police succeeded in arresting Ah Huat on the date of the offence. The appellant disagreed that he did not inform PW3 about Ah Huat.

THE ANALYSIS

[11] Before us only one issue was raised. It pertained to the failure of the

A High Court judge to realise that without the CCTV footage of the lobby of the said hotel being produced, the defence was disadvantaged or prejudiced and the truth of the prosecution's case could not be verified. This issue struck at the very core of the prosecution's case.

B **[12]** It was argued that the High Court judge erred in not invoking s 114(g) of the Evidence Act 1950 when the prosecution failed to produce the CCTV footage. Some 26 years ago, the scope of s 114(g) of the Evidence Act 1950 was laid down by Mohamed Azmi SCJ in *Munusamy v Public Prosecutor* [1987] 1 MLJ 492 at p 494 (SC) in these lucid words:

C

> It is essential to appreciate the scope of s 114(g) lest it be carried too far outside its limit. Adverse inference under that illustration can only be drawn if there is withholding or suppression of evidence and not merely on account of failure to obtain evidence. It may be drawn from withholding not just any document, but material document by a party in his possession, or for non-production of not just any witness but an important and material witness to the case.

D

[13] Under cross-examination, PW3 had this to say about the CCTV footage:

E

(a) at p 11 of the appeal record at *jilid* 1, PW3 testified as follows:

> Ya, pihak security ada beri kebenaran. Lelaki yang memberi kebenaran ialah Encik Rahimi. Saya tidak tahu siapa dia tetapi mungkin dia mempunyai jawatan untuk memberi kuasa. Security manager ialah Encik Rahimi. Saya jumpa dia dalam pukul 2.40 petang. Saya jumpa dia di lobi. Saya yang minta kebenaran untuk guna bilik kawalan. Terdapat CCTV di dalam bilik kawalan. Anggota saya ada teliti pada CCTV, monitor camera, satu di reception di luar dan di kawasan tengah-tengah lobi. Tidak setuju yang monitor camera adalah menyeluruh di lobi. Tujuan letakkan anggota di dalam bilik kawalan CCTV, tapi bila ada nampak kaca cermin, saya suruh Norshila dan Samsuri (sic)(masuk). Saya tidak dapatkan rakaman CCTV pada hari itu. CCTV berfungsi pada hari itu. Saya tidak setuju saya mempunyai kuasa sebagai polis untuk (ambil rakaman) CCTV, saya pernah menjadi Pegawai Penyiasat. Saya tahu saya boleh buat permohonan untuk dapatkan salinan pita rakaman.

F

G

H

(b) at p 78 of the appeal record at *jilid* 1, PW3 said:

> Saya tidak pasti samada daripada CCTV boleh lihat di kawasan lobi sepenuhnya.

I

(c) at p 79 of the appeal record at *jilid* 1, PW3 said:

> Saya tidak setuju versi kami adalah berbeza dengan versi CCTV. Saya tidak setuju yang keterangan saya adalah rekaan semata-mata. Saya tidak setuju bahawa rakaman CCTV tidak diambil sebab kandungan di dalamnya adalah

berbeza dengan keterangan. Saya tidak pasti samada pita rakaman ada diserahkan kepada pihak polis. Saya tidak setuju yang OKT tidak jinjing beg tersebut. Saya tidak setuju OKT tergamam dan terkejut bila ditangkap.

[14] Under re-examination, PW3 was asked about the CCTV footage and this was what he said:

(a) at p 80 of the appeal record at *jilid* 1, PW3 said:

> OKT masuk melalui pintu besar diikuti oleh saya. Rakaman semasa tangkapan tidak mungkin berjaya merakamnya. CCTV hotel tidak boleh merakamkan keseluruhan kawasan hotel.

[15] The security officer of the said hotel was called by the prosecution to testify. He was A Gopi a/l K Acutha Kurup ('PW4'). PW4 was on duty at the said hotel on 3 August 2008 at 3pm. He narrated that on that day at the lobby, he saw a group of people who gathered there and they identified themselves as narcotics police. At pp 55–56 of the appeal record at *jilid* 1, under examination-in-chief, PW4 had this to say:

> On 3.8.2008,1 started working at 4.00 pm but I came to work at 3 pm to do the briefing. At 3 pm I did my briefing at the control room and when I came down to the lobby and I saw a group of people gathered there and looked suspicious. I approached them and asked where are they going. They showed me their identification and told me that (they were) the Narcotics Police. That person is a male and a Malay. The group comprised 5 to 6 persons, there was a female personnel. They were at the hotel lobby. They were in plain clothes.
>
> They want me to give full cooperation and I told them that I had to call the director. They said they were expecting someone and I told them that if they were to do an arrest, do it quietly. After that they caught a Chinese guy and they brought him to (the) service area at the lobby. Before the arrest I was not there but after the arrest, I went there. When they arrested the suspect I was in the control room and opened the door to the service area. The suspect was aged about 40 years. I saw a bag but not sure what was the colour. I cannot tell what kind of bag. I cannot remember who was carrying the bag. From the control room I saw the police caught the suspect and they took him to the back lane. I cannot remember the suspect.

[16] When shown the sketch plan marked as exh 'ID21' — later converted to exh 'P21', PW4 said that he could remember where the appellant was arrested and PW4 marked the spot where the appellant was arrested as 'L4'. Looking at exh 'ID21', 'L4' is located at the lobby area. Indeed the key to exh 'ID21' was marked as 'ID21K' — later converted to exh 'P21K', and it showed that 'L4' is the area of the lobby where the appellant was arrested.

[17] PW4 was also shown a stack of photographs marked as exh 'ID20' —

later converted to exh 'P20', and he was able to identify the photographs to be that of the said hotel. PW4 identified the photograph No 11 to be the place where the appellant was arrested and that could be seen at p 283 of the appeal recort at *jilid* 3. This was what PW4 testified in relation to the stack of photographs (see p 56 of the appeal record at *jilid* 1):

> Refer ID20 - photos 1-14. These are photos of Sunway Resort Hotel. Suspect was arrested at the place marked L4 in photo 11.

[18] Under cross-examination, PW4 categorically said that the police requested and was given a copy of the CCTV tape. This was what PW4 said at p 57 of the appeal record at *jilid* 1:

> Yes, there is a control room at the hotel. No, there are no police personnel stationed at the control room. Yes, there is a CCTV at the lobby. Yes after the arrest the police requested for the CCTV tape. Yes the police was given a copy of the CCTV tape.

[19] Again, under re-examination, PW4 confirmed that the CCTV tape was given to the police. This was what PW4 said at p 58 of the appeal record at *jilid* 1:

> My security officer called me over the walkie talkie and told me that the police had arrested the suspect and it was then I went to the lobby area. I cannot remember to whom the CCTV tape was given but I knew it was given to the police.

[20] After PW4 completed giving his testimony, the High Court judge was informed by learned counsel that the CCTV was not given to them pursuant to s 51A of the Criminal Procedure Code ('CPC'). Section 51A of the CPC makes reference to the delivery of certain documents to the appellant by the prosecution and it is still in its infancy stage. It relates to pre-trial disclosure of evidence by the prosecution. If documents are not supplied to the defence in accordance with s 51A of the CPC, the prosecution is not barred from tendering those documents and the defence may be given time to study those documents (*Public Prosecutor v Mohd Fazil bin Awaludin* [2009] 7 MLJ 741; [2009] 2 CLJ 862 (HC); and *Dato' Seri Anwar bin Ibrahim v Public Prosecutor* [2010] 2 MLJ 312 (FC)). It is germane to mention that in the event the prosecution fails to comply with the provisions of s 51A of the CPC, the prosecution's case would be jeopardised if the trial court refuses to condone the non-compliance by the prosecution of s 51A of the CPC. And s 422 of the CPC may not assist the prosecution if the non-compliance to s 51A of the CPC is material (*Narain and two others v The State of Punjab* AIR 1959 SC 484). Be that as it may, the High Court judge at p 58 of the appeal record at *jilid* 1 made the following annotation:

> At this (juncture) learned counsel informed the court that a copy of the CCTV recording (has not been) given to them pursuant to Section 51A CPC. The defence were made to understand that there was no CCTV recording.

[21] The investigating officer of the case in the person of Inspector Mohana Sundram a/l Vrejenan ('PW6'), in his examination-in-chief, stated that he did not get a copy of the CCTV from the said hotel. This can be easily explained because he did not ask for the CCTV. At p 70 of the appeal record at *jilid* 1, PW6 testified in his examination-in-chief as follows:

> Saya tidak mendapatkan salinan CCTV daripada pihak resort. Saya tidak ada minta tidak diberi oleh pihak security resort.

[22] Under cross-examination, PW7 said that he saw the security camera. But he did not know how many CCTVs were there. Neither was there any reconnaissance ('tinjauan') of the said hotel by PW7. In its original text, this was what PW7 said as seen at p 88 of the appeal record at *jilid* 1:

> Di dalam bilik security saya bersama dengan Lans Koperal Norshila. Dalam bilik security saya dalam 25 minit. Pada masa itu ada security sama ada seorang atau 2 orang. Tidak kenal nama mereka tetapi bangsa India. Kebenaran diperolehi oleh Chief Inspektor Loi dengan pegawai security. Saya nampak kamera security. Saya tidak tahu berapa banyak CCTV. Saya tidak buat tinjauan.

[23] The director of security and safety of the said hotel by the name of Mohamad Ibrahim s/o Gula Kader ('PW9') was called by the prosecution and in his examination-in-chief at p 97 of the appeal record at *jilid* 1, he categorically said that:

> The CCTV is focussed at 32 locations at the hotel and also at the lobby.

[24] Under cross-examination, PW9 said that the police did not record his statement and that he only knew that he would be called as a witness two days prior to giving evidence. At p 98 of the appeal record at *jilid* 1, this was what PW9 said about the CCTV:

> Yes, the police surveillance, arrest (was) not recorded in the hotel record. Yes, there were 32 channels in the control room manned by the control officer. There is only 1 personnel in the control room and he works in shift. From the sketch plan, the control room is at L2. The CCTVs used are not sold in the market. Yes, we have CCTVs which can capture images at the lobby and cover the entrance lobby. The staff entrance is a door which opens up to a leading area. Yes, my camera can record. Yes, it can be brought to court and can be displayed in court. Yes, the cameras are in good working condition, sometimes malfunction does happen and it would be

repaired immediately. Yes, on that day in question the camera was working well. Yes, the presence of people working is captured in the camera. Yes, during that period it was quite a busy day.

[25] In re-examination, PW9 had this to say at p 99 of the appeal record at *jilid* 1 in regard to the CCTV:

With regard to the 3 arrests involved narcotics case, where I was involved. In this incident no CCTV recording was given. I have the sole control of the CCTV.

[26] Learned defence counsel then questioned PW9 further in regard to the CCTV, and the response by PW9 was recorded at p 99 of the appeal record at *jilid* 1:

As far as I am concerned no application (was) made by (the) police in this case for a copy of the recording of the CCTV. Normally the police will apply but in this case no as it did not involve hotel guests. If the police had applied we would give. The request must be made officially by letter. If I am on leave, my deputy will know about it and if there was any request we will assist the police. My deputy is Encik Kamal Hassan.

[27] Not to be outwitted, the learned deputy public prosecutor who conducted the prosecution before the High Court judge was given the liberty to question PW9 further. And PW9 had this to say about the CCTV at p 100 of the appeal record at *jilid* 1:

So far there was no request made by the police for a copy of the CCTV.

[28] Further questions were permitted by the High Court judge. His Lordship recorded the answers to the questions posed by both defence counsel and the deputy public prosecutor in this way as seen at p 101 of the appeal record at *jilid* 1:

Defence Counsel

Defence asked saksi sama ada minta salinan CCTV tapi tidak dibekalkan. Saksi jawab 'Ya'. Permintaan dibuat secara lisan tapi tidak dibekalkan. Permintaan dibuat kepada Gopi (SP4) tapi pada tarikh seterusnya pengarah (pergi) outstation, dia tidak tahu penyerahan kepada siapa.

DPP

Permintaan dibuat untuk salinan CCTV dibuat kepada Gopi secara lisan dan Gopi kata dia kena rujuk kepada director. Saya tidak terima apa-apa salinan CCTV.

[29] The importance of the CCTV footage cannot be doubted. It would

clear the lingering doubt of whether Ah Fatt carried the black bag and threw it to the floor and bolted at the lobby of the said hotel leaving the appellant to face the music, so to speak, or it was the appellant who was all alone was seen by PW3 carrying the black bag in his right hand and entering the lobby of the said hotel and was placed under arrest by PW3. Had the CCTV footage being produced, the High Court judge would be in a better position to verify the prosecution's version. Bereft of the CCTV footage, the High Court judge should have invoked the presumption under s 114(g) of the Evidence Act 1950 bearing in mind 'that evidence which could be and is not produced would if produced be unfavourable to the person who withholds it' and acquitted and discharged the appellant without calling for his defence.

[30] Right from the very start, the importance of the CCTV footage was highlighted by the defence. PW4 was categorical when he testified that the police had requested and was given the CCTV tape. PW9 testified that there were CCTVs focused at 32 locations at the said hotel and also at the lobby. These CCTVs would surely verify the version of the prosecution if tendered. Yet, not a single CCTV tape was produced and tendered by the prosecution.

[31] The High Court judge acknowledged that the police had requested for a copy of the CCTV and a copy was in fact given to the police. At p 246 of the appeal record at *jilid* 3, His Lordship said:

> SP4 - adalah Pegawai Keselamatan di Sunway Resort - keterangan saksi ini semasa disoalbalas oleh pihak pembelaan tertumpu kepada bilik kawalan CCTV di mana beliau mengatakan bahawa tiada anggota polis ditempatkan di bilik kawalan CCTV. Saksi ini juga mengatakan bahawa di kawasan lobi hotel terdapat CCTV dan selepas tangkapan dibuat pihak polis ada meminta salinan CCTV yang mana satu salinan rakaman CCTV telah diberikan.

[32] Contrary to the evidence by PW4, PW9 testified that CCTV recording was not given to the police because there was no written request by the police for a copy of the CCTV. Since the police did not record the statement of PW9, there was no opportunity for the learned deputy who conducted the prosecution to impeach the credit of PW9. Thus, we have two sets of evidence in regard to the nagging question of whether a copy of the CCTV was given to the police. These two contradictory or variant narratives struck at the very root of the prosecution's case and it must surely benefit the defence (*Yusoff bin Kassim v Public Prosecutor* [1992] 2 MLJ 183 (SC); *Public Prosecutor v Lee Eng Kooi* [1993] 2 MLJ 322; *Lee Ah Seng & Anor v Public Prosecutor* [2007] 6 MLJ 1; [2007] 4 AMR 709 (FC); *Adzhaar bin Ahmad & Anor v Public Prosecutor* [1996] 4 MLJ 85; *Public Prosecutor v Tai Mei Yuen* [2004] 4 MLJ 541; *Periasamy v Public Prosecutor* [1966] 1 MLJ 138 (FC); *Harchand Singh & Anor v State of Haryana* AIR 1974 SC 344; and *Public Prosecutor v Rajandiran a/l Kadirveil* [2002] 7 MLJ 77).

[33] In our judgment, the non-production of the CCTV footage amounts to a withholding or suppression of evidence and if it was produced, it would be unfavourable to the prosecution and, consequently, the adverse presumption under s 114(g) of the Evidence Act 1950 must be invoked against the prosecution.

[34] It goes without saying that the non-production of the CCTV footage had disadvantaged or prejudiced the defence and the truth of the prosecution's case could not verified. Indeed in a criminal trial, fairness must be displayed by the prosecution. And the concepts of a fair trial and fairness have been recognised by our Malaysia Courts in *Cheak Yoke Thong v Public Prosecutor* [1984] 2 MLJ 119 (FC); *Goi Ching Ang v Public Prosecutor* [1999] 1 MLJ 507 (FC); *Tan Hun Wah v Public Prosecutor and another appeal* [1994] 1 MLJ 382; [1994] 1 AMR 113 (SC); *Azahan bin Mohd Aminallah v Public Prosecutor* [2005] 5 MLJ 334; [2004] 6 AMR 810 (CA); and *Public Prosecutor v Abdul Manaf bin Muhamad Hassan* [2006] 3 MLJ 193; [2006] 2 CLJ 129 (FC).

[35] In *Brown v Stott (Procurator Fiscal Dunfermline)* [2001] 2 All ER 97 (PC); [2001] SC 43 (PC); [2003] 1 AC 681 (PC), the Privy Council discussed the 'equality of arms' principle and described the principle lucidly as 'lying at the heart of the right to a fair trial'. The Supreme Court of Victoria in *Ragg v Magistrates Court of Victoria & Corcoris* [2008] VSC 1, emphasised the duty of the prosecution to promote fairness in this way:

> (69) The principles of the courts establish that the general duty of a prosecutor is to prosecute and not to defend, but the prosecution 'must be conducted with fairness towards the accused … and with a single view to determining and establishing the truth'. Therefore prosecutors should see themselves as 'ministers of justice'. Their duty is to 'assist the court in the attainment of the purpose of criminal prosecutions, namely, to make certain that justice is done as between the subject and the State'. In performing that function, the prosecutor must act with the objective 'of establishing the whole truth in accordance with procedures and standards which the law requires to be observed and of helping to ensure that the accused's trial is a fair one'.

[36] Now, s 114(g) of the Evidence Act 1950 applies to both civil and criminal cases. It operates when a witness is not called (*Chua Kim Suan v Ang Mek Chong* [1988] 3 MLJ 231; *Eastern & Oriental Hotel (1951) Sdn Bhd v Ellarious George Fernandez & Anor* [1989] 1 MLJ 35 (SC); *Guthrie Sdn Bhd v Trans-Malaysian Leasing Corp Bhd* [1991] 1 MLJ 33 (SC); *Abdullah Zawawi v Public Prosecutor* [1985] 2 MLJ 16 (SC); *Public Prosecutor v Chew Yoo Choi* [1990] 2 MLJ 444; and *Jazuli bin Mohsin v Public Prosecutor* [1990] 2 MLJ 190), or in a situation, like the present case, where the CCTV footage which is a piece of material evidence has not been produced. A classic example would be

the case of *Public Prosecutor v Abdul Razak bin Johari* [1991] 1 MLJ 105, where an adverse inference was drawn against the prosecution for its failure to produce the first information report.

[37] The law books are replete with authorities in regard to the failure of the prosecution to tender material documents which attracted the invocation of s 114(g) of the Evidence Act 1950. For a start, reference is made to the case of *Munshilal v State of MP* [1960] MPLJ 13, where a prosecution under the Suppression of Immoral Traffic in Women and Girls Act 1956 was initiated and the prosecution failed to produce the list of prostitutes, a presumption was invoked against the State. Next, is the case of *Harjit Singh Mann v S Umrao Singh and others* AIR 1980 SC 701 (SC) which concerned an election petition under the Representation of the People Act 1951 where the allegation was that the nomination paper was filed late and on non-production of the receipt showing the date and time of the presentation of the election petition, the court was justified in drawing an adverse inference against the petitioner. And, finally, in a string of cases (*Murugesam Pillai v Gnana Sambandha Pandara Sannadhi* AIR 1917 PC 6 (PC); *Ram Prakash Das v Anand Das* AIR [1916] PC 256 (PC); and *Rameshwar Singh v Bajit Lal Pathak and others* AIR [1929] PC 95 (PC)), the judicial committee strongly condemned the practice of the parties to a suit withholding from the court, evidence which may throw light on the points for determination.

[38] Illustration (g) to s 114 of the Evidence Act 1950 is based on the maxim *omnia praesumuntur contra spoliatorem* (if a man wrongfully withholds evidence, the court can draw every presumption to his disadvantage, consistent with the facts admitted or proved). It must be borne in mind that the best evidence rule governs the production of evidence in court and when the best evidence is withheld, it is only fair to presume that the party withholding the evidence had some ulterior motive in not producing it and if produced, would be detrimental to that party, and that attracted the adverse inference provision.

[39] At the end of the prosecution's case, the High Court judge accepted the version of the prosecution as credible notwithstanding the fact that the CCTV footage was not tendered and the two contradictory or variant narratives of PW4 and PW9 in regard to the CCTV footage introduced two sets of evidence for the prosecution. To compound the matter further, PW3 testified that PW7 and Lance Corporal Norshila were stationed in the security guard's room of the said hotel and according to PW3, in that room, there was a small glass window that could see outside. At p 40 of the appeal record at *jilid* 1, in examination-in-chief, PW3 testified in this way:

> Di dalam bilik itu ada satu tingkap cermin yang boleh nampak luar.

[40] PW3 also testified in examination-in-chief that in the security guard's room where he was located together with Lance Corporal Norshila, there were windows that could see outside. At p 83 of the appeal record at *jilid* 1, PW7said:

> Selepas itu … saya dan Norshila dibawa masuk ke bilik security di mana di kawasan pejabat security terdapat cermin-cermin yang boleh lihat di luar kawasan hotel.

[41] And from where he was located, PW7 testified that he could see the appellant walked towards the lobby of the said hotel while carrying a bag in his right hand. And at the same time, PW7 saw PW3 followed the appellant from behind. In its original text, this was what PW7 testified in examination-in-chief at p 83 of the appeal record at *jilid* 1:

> Semasa pemerhatian pada jam lebih kurang 3.00 petang saya nampak seorang lelaki Cina berjalan kaki menghala ke lobi hotel tersebut sambil menjinjing satu beg di tangan sebelah kanan. Dalam masa sama saya nampak Chief Inspektor Loi mengekori lelaki Cina dalam 10 ke 15 meter.

[42] PW9 were shown some photographs when he testified. In relation to the 'security guard's room' of the said hotel where PW7 and Lance Corporal Norshila were located, PW9 referred to that room as the 'control room'. According to PW9, at p 97 of the appeal record at *jilid* 1, during examination-in-chief:

> There is no window in the control room.

[43] Without any window in the control room (security guard's room) how could PW7 see what transpired outside the room. The only way to verify PW7's version would be to see the CCTV footage which, unfortunately, was not tendered by the prosecution and that, in our judgment, weakened the prosecution's case at the very outset. In our judgment, the defence of the appellant should not be called and he should be acquitted and discharged without his defence being called. The learned High Court judge in his analysis of the evidence adduced by the prosecution and the defence had this to say at pp 262–263 of the appeal record at *jilid* 1:

> Pihak pembelaan juga menimbulkan isu percanggahan keterangan di antara saksi-saksi pendakwaan yang menjejaskan kredibiliti mereka. Di antara percanggahan yang ditimbulkan ialah tentang sama ada terdapatnya tingkap di bilik sekuriti yang membolehkan saksi pendakwaan SP7 dan Norshila melihat OKT masuk menuju ke bahagian lobi hotel. Keterangan SP9 pula mengatakan di bilik sekuriti tidak ada tingkap yang membolehkan SP7 dan Norshila melihat kelibat OKT apabila masuk ke hotel.

Pada pendapat Mahkamah percanggahan yang timbul bukanlah material sehingga menjejaskan kes pendakwaan, kerana yang relevan ialah terdapatnya keterangan daripada saksi pendakwaan (SP3) yang OKT ditahan seorang diri di lobi hotel bersama dengan beg ekshibit P9 bersamanya.

[44] It is apparent that His Lordship merely shut his eyes to the obvious and ignored the fact that the testimony of PW7 was highly suspect because there was no window in the control room (security guard's room) which would allow PW7 to see the appellant carrying the bag in the appellant's right hand while walking towards the lobby of the said hotel. The versions of PW3 and PW7 could easily be verified if the CCTV footage was tendered by the prosecution. Yet, in the absence of the CCTV footage, the High Court judge made a finding of fact that the appellant had possession of the bag and knew the contents of the bag to contain the drug ketamine. At p 263 of the appeal record at *jilid* 3, the High Court judge said:

Mahkamah mendapati bahawa OKT mempunyai milikan, kawalan dan milikan terhadap beg ekshibit P9 serta kandungan dadah di dalamnya. OKT semestinya mempunyai pengetahuan tentang kandungan dadah ketamine di dalam P9 semasa ditangkap.

[45] Two observations must be made here. Firstly, when the prosecution evidence admits two or more inferences, one of which is in the accused's favour, then it is the duty of the court to draw the inference that is favourable to the accused (*Tai Chai Keh v Public Prosecutor* [1948–1949] Supp MLJ 105b; and *Public Prosecutor v Kasmin bin Soeb* [1974] 1 MLJ 230). Secondly, appellate intervention is called for when the inferences by the trial court were not supported by the weight of evidence. In this context, the speech of Yong Pung How CJ (Singapore) in *Khua Kian Keong and another v Public Prosecutor* [2003] 4 SLR 526 at p 531 should be referred to. There, His Lordship aptly said:

Principles of appellate intervention

13 It is beyond dispute that an appellate court will be slow to overturn findings of fact by the trial judge especially when an assessment of the credibility and veracity of the witnesses has been made: *Ang Jwee Herng v Public Prosecutor* [2001] 1 SLR(R) 720 and *Public Prosecutor v Hendricks Glen Conleth* [2003] 1 SLR(R) 426. I reiterated the requirements for appellate intervention in Ang Jwee Herng (at (62)). The trial judge's decision must be 'plainly wrong or against the weight of the objective evidence before the court'.

14 If however the trial judge's assessment of a witness' credibility was based not so much on his demeanour as a witness, but on inferences drawn from the content of his evidence, the appellate court is in as good a position as the trial court to assess the same material: *Awtar Singh s/o Margar Singh v Public Prosecutor* [2000] 2 SLR(R) 435. The appellate court might not be in a position to assess the witness' demeanour, but it should not refrain from evaluating the conclusions of the trial judge based on

all the facts known to him. The Court of Appeal in *Bala Murugan a/l Krishnan v Public Prosecutor* [2002] 2 SLR(R) 420 (at (21)) provided another expression, namely that interference is justified when 'inferences drawn by the trial court were found to be not supported by the primary facts on the record'. I had summed up this principle in *Sahadevan s/o Gundan v Public Prosecutor* [2003] 1 SLR(R) 145 (at (17)):

> Nevertheless, while an appellate court should be reluctant to interfere with a finding of fact, it is always free to form an independent opinion about the proper inference to be drawn from a finding of fact.

15 My view is that the inferences drawn by the trial judge, independent of his observation of demeanour, were incorrect. These errors had led to convictions that were against the weight of the evidence. It was highly questionable to me whether the prosecution's case was proven beyond a reasonable doubt.

[46] There was also confusion in regard to the registration number of the Volvo motorcar. This was acknowledged by the High Court judge in his written grounds of judgment at p 248 of the appeal record at *jilid* 3. There, His Lordship said:

> (iii) Nombor pendaftaran dan jenis kereta yang dipandu oleh OKT: Di dalam soal utama SP3 dikatakan telah mengatakan bahawa 'Pada pukul 3 petang suspek tiba di tempat kejadian menaiki sebuah kereta Volvo dipandu oleh seorang lelaki Cina. Nombor pendaftaran ialah WDV 8968. SP6 pula berkata beliau terima barang kes sebuah kereta Volvo nombor pendaftaran WDD 8984. Manakala SP6 berkata yang beliau telah memohon carian rasmi JPJ terhadap kereta tersebut dan telah terima sesalinan dokumen pendaftaran untuk kereta nombor pendaftaran kereta Volvo WDD 8968'.

[47] The two photographs at p 285 of the appeal record at *jilid* 3 showed the Volvo motorcar and the registration No as WDB 8968. As police officers, PW3 (the arresting officer) and PW6 (the investigating officer) should have read their statements before they gave evidence. In this way, simple mistakes could be avoided.

THE CONCLUSION

[48] We listened attentively to the submissions of the parties on both sides and in open court, we announced our decision as follows:

> Unanimous decision. Bereft of the CCTV recording, the case for the prosecution collapsed like a deck of cards, so to speak. There was evidence adduced by the prosecution that a copy of the CCTV recording was handed over to the police and yet the prosecution did not tender that particular CCTV recording as an exhibit. Therefore, in the circumstances, s 114(g) of the Evidence Act 1950 should be

invoked against the prosecution. In our judgment, the prosecution failed to prove its case beyond reasonable doubt. The law is no respector of persons and the law must be applied across the board to everyone. Accordingly, we allow the appeal of the appellant. We set aside the conviction and sentence imposed by the High Court. We set the appellant free.

[49] We are grateful to the parties on both sides for assisting us arriving at a just decision.

Appeal allowed and appellant acquitted and discharged.

Reported by Ashok Kumar